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No. 89-1487

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1989

WANDA RAMEY SUTHERLAND, et al.,

Petitioners,

v.

KENNETH A. HOLCOMBE, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the appellate court err in failing to extend the reasoning of Brower v. County of Inyo, 109 S. Ct. 1378 (1989), to cases involving natural roadblocks, and in therefore holding that no fourth amendment seizure occurred where police continued a close range, high speed chase into a dangerous curve knowing that to do so would cause the death of the fleeing driver and his passenger?

2. Did the appellate court err in interpreting Graham v. Connor, 109 S. Ct. 1865 (1989), to foreclose the assertion of a fourteenth amendment substantive due-process claim in all cases in which an unreasonable seizure is alleged, even where it is held as a matter of law that no seizure occurred?

LIST OF PARTIES IN THE COURT OF APPEALS

In the Court of Appeals for the Fourth Circuit, the appellants were Wanda Ramey Sutherland, administratrix of the estate of Warren Thomas Sutherland, and Lola M. White, administratrix of the estate of Donald Joe White. The appellees were Kenneth A. Holcombe, individually and as Chief of Police of the Police Department of the City of Easley, South Carolina; James Terry Moore, individually and as a Police Officer of the City of Easley, South Carolina; and the City of Easley, South Carolina, a Municipal Corporation.

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The opinion of the United States Court of Appeals for the Fourth Circuit (App. A, infra, A-1 -- A-12) and the order of the district court (App. B, infra, A-13 -- A-33) are unpublished.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §§ 1331 and 1343 and under pendent jurisdiction, the Petitioners brought this suit in the United States District Court of the District of South Carolina.

On October 21, 1988, the matter was referred to United States Magistrate Catoe by United States District Judge Anderson pursuant to 28 U.S.C. § 636(c).

On January 31, 1989, the district court entered an order and judgment granting Respondents' motion for summary

judgment.

On Petitioners' appeal, the Fourth Circuit on November 17, 1989, entered a judgment and opinion affirming the district court.

On December 11, 1989, the Fourth Circuit denied Petitioners' petition for rehearing and suggestion for rehearing in banc.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked pursuant to 28 U.S.C. § 1254-(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves amendment IV and § 1 of amendment XIV of the United States Constitution and section 1983 of title 42 of the United States Code.

The fourth amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Section 1 of the fourteenth amendment provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

> any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Section 1983 of title 42 of the United States Code provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

On September 7, 1985, the Respondent, James Terry Moore, a policeman with the City of Easley, began pursuit of a vehicle which had crossed the center line of a city street at an estimated speed of 65 mph (J.A. at 61) ["J.A." refers to the Joint Appendix filed in the appellate court]. This chase subsequently escalated into a high-speed pursuit at speeds reaching 100 mph (J.A. at 121). The pursuit proceeded through a residential section of Easley and continued down a curvy and winding road toward a dangerous curve (J.A. at 66). Respondent Moore and his passenger, Larry Waters, knew that the pursued vehicle could not make the dangerous curve in the road at the high speed (J.A. at 97). The City of Easley dispatcher also warned Respondent Moore that the pursued vehicle could not make

the dangerous curve at a high speed (J.A. at 97). Nevertheless, Respondent Moore consciously disregarded the danger to the driver in the pursued vehicle, the danger to the passenger in the pursued vehicle, and the danger to his own passenger by continuing the pursuit at such high speeds while only two or three car lengths away from the pursued vehicle. Respondent Moore slowed down just before reaching the dangerous curve so that it could be negotiated by him (J.A. at 86). The pursued vehicle, however, left the road after the dangerous curve, and crashed into a telephone pole. The driver, Donald Joe White, age 20, and his passenger, Warren Thomas Sutherland, age 22, were killed immediately (hereinafter referred to as "the Decedents").

The City of Easley dispatcher testified that he told Respondent Moore and

his partner Waters that the Decedents' vehicle, a white Maverick, was being pursued into Easley (J.A. at 98-99). Moore and Waters were not told why the Decedents were being pursued, however, and in fact the only crimes suspected of the Decedents were traffic violations occurring just before and during the high speed chase (J.A. at 98-99).

Photographs taken of the police vehicle shortly after the accident which killed the Decedents show indications of white paint on the left front bumper of the police vehicle. Such photographs are evidence that in fact the police vehicle bumped the decedents' vehicle off the road. These photographs were maintained in a private file by Respondent Kenneth A. Holcombe, the Chief of the City of Easley Police Department, and were not shown to the investigating officer of the

South Carolina Highway Patrol or to the Easley Police Department officer assigned to conduct an internal investigation (J.A. at 103, 110, 153). In addition, photographs taken of the scene of the accident show brake marks, an absence of damage to a mailbox, grass and bushes along the roadside, and that a telephone pole was clipped at five feet above ground level (Ex. 4, 5, 7 & 8) ["Ex." refers to the exhibits utilized in the district court]. The distance from the curve to the telephone pole was measured by the investigating officer of the South Carolina Highway Patrol as approximately 244 feet (Ex. 2). Such photographs and such distance are inconsistent with the testimony of Respondent Moore that Decedent White didn't appear to ever turn his steering wheel and never made the turn in the curve (J.A. at 67).

The policy implemented by Respondent Holcombe on behalf of the City of Easley regarding high speed pursuit gave police officers unbridled authority concerning what actions were appropriate to stop a fleeing vehicle, including bumping of such vehicles (J.A. at 57, 105). The Easley Police Department did not have any written policy, guidelines, or directives regarding hot pursuit inside the city limits of Easley (J.A. at 105). Also, the policy of the Easley Police Department was that the extent of deadly force and the manner in which deadly force was applied in a hot pursuit was within the officer's discretion (J.A. at 113). As a result of this policy, the Easley Police Department used dangerous methods such as high speed wrecks, the firing of weapons, and bumping to stop vehicles (Ex. 3; J.A. at 165).

Petitioners brought actions under 42 U.S.C. § 1983, alleging violations of the decedents' fourth, fifth, and fourteen amendment rights. After the actions were consolidated, the Respondents filed a motion for summary judgment, and the Petitioners filed for judgment on the pleadings and partial summary judgment. After argument, a United States magistrate entered summary judgment for the Respondents, holding that the Petitioners had failed to come forward with evidence that Respondents had effected a seizure or that they used constitutionally excessive force in violation of Petitioners' fourteenth amendment rights (App. A-13 --33).

The Fourth Circuit affirmed, holding that Petitioners did not present sufficient evidence of a seizure to support a jury verdict, and holding that the Peti-

tioners' fourteenth amendment substantive due-process claims were foreclosed under Graham v. Connor, 109 S. Ct. 1865 (1989).

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT ERRED IN FAILING TO EXTEND THE REASONING IN BROWER V. COUNTY OF INYO, 109 S. CT. 1378 (1989), TO CASES INVOLVING NATURAL ROADBLOCKS, AND IN THEREFORE HOLDING THAT NO SEIZURE OCCURRED WHERE POLICE CONTINUED A CLOSE RANGE, HIGH SPEED CHASE INTO A DANGEROUS CURVE, KNOWING THAT TO DO SO WOULD CAUSE A HIGH SPEED ACCIDENT.

In Brower v. County of Inyo, supra, 109 S. Ct. 1378, this Court held that a seizure occurs where police officers intentionally terminate a person's movement through the use of a roadblock. Id. at 1380. In so holding, this Court set forth a straightforward test for when a

fourth amendment seizure occurs. Under such test, a seizure occurs whenever "there is a governmental termination of freedom of movement through means intentionally applied." Id. at 1381 (emphasis in original). In applying the test to the roadblock situation, this Court refused to conduct an inquiry into the subjective intent of the officers utilizing the roadblock, finding that any such attempt would be impracticable. Id. at 1382. Moreover, it refused to distinguish between a roadblock designed to give an oncoming driver the option of stopping voluntarily and one designed to produce a collision, finding that, in determining whether the means that terminates the freedom of movement is the means that the government intended, such a distinction would draw too fine a line. Id.

Petitioners contend that the instant circumstances present a question of fact as to whether the respondents intentionally terminated the Decedents' freedom of movement through the use of the dangerous curve that functioned as a natural roadblock. The primary evidence supporting such contention is the fact that Respondent Moore and his partner Waters knew that the Decedents' vehicle could not make the dangerous turn at high speed, and they were so warned by their dispatcher, but they continued the pursuit at very close range until just before reaching the curve and only at that point slowed their pursuit (J.A. at 86). In addition, there is photographic evidence that the patrol car actually bumped the Decedents' car from the road, and that refutes the testimony of Respondent Moore of how the wreck occurred.

Petitioners contend that no distinction should be made between artificial and natural roadblocks in determining whether a seizure has occurred. So long as a natural roadblock is a means intentionally applied to terminate freedom of movement, under the test set forth in Brower a seizure has occurred. A distinction between natural and artificial roadblocks, like a distinction between roadblocks designed to give an oncoming driver the option to stop and roadblocks designed to produce a collision, would be drawing too fine a line "[i]n determining whether the means that terminates the freedom of movement is the very means that the government intended[.]" Brower v. County of Inyo, supra, 109 S. Ct. at 1382. It will of course be the exceptional case when police officers make intentional use of a natural roadblock to

terminate freedom of movement. In most cases involving collisions occurring during high speed chases, the collisions result from the dangerous nature of the high speed chase itself, not from the intentional actions of the police. See, e.g., Roach v. City of Fredericktown, 882 F.2d 294 (8th Cir. 1989) (pursuit ended when fleeing driver lost control of car and collided with oncoming car). Petitioners contend, however, that in the case at bar there is a question of fact as to whether the circumstances present such an exceptional case.

The appellate court rejected such argument, reasoning as follows:

> The record, however, reveals that the decedents chose the route and that the police merely realized the danger and slowed down. Nothing other than counsels' speculation suggests police deliberately forced the decedents into the curve with the intention of causing them to crash and slowed only

> after the accident which ultimately killed the decedents was unavoidable.

Sutherland v. Holcombe, No. 89-1708, slip op. at 5 (4th Cir. Nov. 17, 1989) [App. A-9].

The reasoning of the appellate court is inconsistent with the test set forth in and the holding in Brower. That the Decedents chose the route and the police realized the danger and slowed down does not distinguish the case from the artificial roadblock situation held to effect a seizure in Brower. In stating that there was no evidence other than speculation that the police deliberately forced the decedents into the curve intending to cause them to crash, the court required evidence of the subjective intent of the pursuing officers, a consideration expressly deemed irrelevant in Brower. The evidence that the police officers knew

that the Decedents would crash in the upcoming dangerous curve if they continued the high speed chase into the curve--and acted as they did, continuing the chase at close range into the curve --is objective evidence that the police must have intended that Decedents' freedom of movement be terminated through the means of the curve. Given such evidence, summary judgment against the Petitioners was inappropriate.

In holding that no seizure occurred under the instant facts, the appellate court failed to apply the Brower test and refused to extend the holding of Brower to the natural roadblock situation. Petitioners contend that, under the Brower test, no distinction should be made between artificial and natural roadblocks. Petitioners respectfully request that this Court grant a writ of certiorari in

order to define the scope of the Brower test and determine whether police offers may knowingly and intentionally utilize natural roadblocks to terminate high speed chases without effecting a seizure under the fourth amendment.

II. THE APPELLATE COURT ERRED IN INTERPRETING GRAHAM V. CONNOR, 489 109 S. CT. 1865 (1989), TO PRECLUDE THE ASSERTION OF A FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAIM IN ALL CASES IN WHICH AN UNREASONABLE SEIZURE IS ALLEGED, EVEN WHERE IT IS HELD AS A MATTER OF LAW THAT NO SEIZURE OCCURRED.

After holding that the instant circumstances as a matter of law did not constitute a seizure under the fourth amendment, the appellate court considered the Petitioners' fourteenth amendment substantive due process argument. The

court held that Graham v. Connor, supra, "foreclosed that theory in cases such as the one at bar." Sutherland v. Holcombe, supra, slip op. at 6. The court quoted the following language from Graham v. Connor, supra, 109 S. Ct. at 1871:

> [A]ll claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other "seizure" of free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive" due process approach.

The court then concluded that its "preceding fourth amendment analysis, therefore, disposes of appellants' substantive due process argument." Sutherland v. Holcombe, supra, slip op. at 6 [App. A-__].

The basic holding of Graham is clear: claims that unreasonable force was used in the course of a seizure must

be analyzed under the fourth amendment reasonableness standard rather than the substantive due process standard. What is not clear is how far the holding of Graham extends. The Petitioners in the case at bar asserted both a fourth amendment unreasonable seizure claim and a substantive due process claim. The appellate court held that, as a matter of law, no fourth amendment seizure occurred. The court then held that such analysis disposed of the substantive due process claim. In effect, the court held that where a plaintiff asserts an unreasonable seizure claim under the fourth amendment, he can not assert in the alternative that, if no seizure occurred, his substantive due process rights were violated.

Nothing in Graham suggests that it was intended to preclude the assertion in the alternative of a fourth amendment unreasonable seizure claim and a substantive due process claim in cases such as the instant one. The excessive force claim asserted in Graham arose in the context of an investigatory stop; there was no question that a seizure in fact occurred. See Graham v. Connor, supra, 109 S. Ct. at 1871. The claim asserted, therefore, unquestionably invoked the protections of the fourth amendment. Id. at 1871. In the instant case Petitioners contend that there is a question of fact as to whether a seizure occurred; if no seizure occurred, Petitioners wish to assert that a substantive due process violation occurred. The assertion of such alternative claim would be consistent with the reasoning of this Court in

Graham, which emphasized that § 1983 "is not itself a source of substantive rights," id. at 1870, and that "there is no generic 'right' to be free from excessive force grounded . . . in 'basic principles of § 1983 jurisprudence." Id. Petitioners assert rights grounded firmly in the fourth and fourteenth amendments.

Several cases in other circuits conflict with the instant case by applying substantive due process concepts in cases similar to the instant case. See Roach v. City of Fredericktown, supra, 882 F.2d at 296-97; Britt v. Little Rock Police Department, 721 F. Supp. 189 (E.D. Ark. 1989). Such cases also evidence the confused state of the current law regarding the scope of Graham. In Roach, the Eighth Circuit considered a high speed chase that ended when the fleeing driver collided with a third car. The court

correctly held that, under Graham, no fourth amendment unreasonable seizure occurred because the pursuing police officer did not intend that the pursuit end by means of an accident with another vehicle. Roach v. City of Fredericktown, supra, 882 F.2d at 296.

The Roach court then considered the claims asserted by passengers in the third car that their fourteenth amendment right to be free from unreasonable interference had been violated. It reasoned that

> [b]ecause the Kellers' claim of excessive force arises in the context of an arrest or investigatory stop, the claim 'is most properly characterized as one invoking the protections' of the fourth amendment's prohibition against unreasonable search and seizure. Graham, 109 S.Ct. at 1871.

Id. at 297.

The Roach court thus held that no seizure occurred, and then ignored such

holding in reasoning that, because the case arose in the context of a seizure, the fourth amendment reasonableness standard applied. Applying the fourth amendment standard, it held that the pursuing officer's use of high speed pursuit was reasonable under the circumstances. The court thus applied the fourth amendment reasonableness standard to claims made under the fourteenth amendment in a case in which no seizure occurred.

The Roach court also considered claims by the passenger in the fleeing car and the passengers in the third car that they were denied due process because of the pursuing officers's negligence, which allegedly "shocked the conscience." The court held that the pursuing officer's actions did not rise to the level of conduct that would sustain a claim under § 1983. 882 F.2d 294. The court

thus applied the substantive due process test in a case involving an alleged unreasonable seizure.

In Britt v. Little Rock Police Department, supra, the district court considered substantive due process claims arising out of an accident that concluded a high speed chase. The plaintiffs were not the person fleeing. 721 F. Supp. at 192. The court analyzed the case first under substantive due process concepts. Id. at 192-95. It granted summary judgment under such concepts because there was no evidence reasonably suggesting that the pursuing officer was reckless or grossly negligent. Id. at 195. (The facts can be contrasted with the instant ones, since in Britt there was "no evidence of intent to injure, either in the sense of desiring to cause harm or knowing that the harm was substantially cer-

tain to result." Id. at 194 (emphasis added).)

The Britt court then proceeded to apply a fourth amendment reasonableness standard. It reasoned that because

> the injuries inflicted on plaintiffs could be considered to be part of the officer's attempted seizure of the fleeing suspect, so that an unreasonable pursuit in the nature of excessive force would violate the Fourth Amendment, applied to the states by the Fourteenth.

Id. at 191. It held that the plaintiffs had "failed to come forward with evidence sufficient to make a case submissible to a jury that the officer's conduct was Constitutionally unreasonable." Id. at 195.

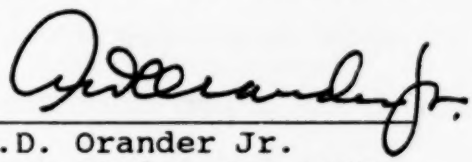
The appellate court in the instant case held that Graham precluded the assertion of fourteenth amendment substantive due process claims in cases such as the instant one. The Britt and Roach

courts held otherwise, permitting the assertion of fourteenth amendment claims under varying fourteenth and fourth amendment standards, and holding only that, under such standards, the plaintiffs failed to come forward with sufficient evidence to submit the claims to a jury. Petitioners respectfully request that this Court grant a writ of certiorari in order to resolve the conflict among the circuits concerning whether such claims can be asserted, and to eliminate the present confusion about the standard or standards which apply.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request this Court to grant this petition and issue a writ of certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,



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APPENDIX

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT
OF APPEALS
FOR THE FOURTH CIRCUIT

No. 89-1708

WANDA RAMEY SUTHERLAND, Administratrix of the estate of Warren Thomas Sutherland, deceased; LOLA M. WHITE, Administratrix of the estate of Donald Joe White, deceased

Plaintiffs - Appellants

v.

KENNETH A. HOLCOMBE, individually and as Chief of Police of the Police Department of the City of Easley, South Carolina; JAMES TERRY MOORE, individually and as a police officer in the Police Department of the City of Easley, South Carolina; CITY OF EASLEY, SOUTH CAROLINA, a Municipal Corporation

Defendants - Appellees

Appeal from the United States District Court for the District of South Carolina, at Anderson. William M. Catoe, Jr., United States Magistrate. (CA-88-1075-3).

Argued: October 4, 1989
Decided: November 17, 1989

Before SPROUSE, Circuit Judge, BUTZNER, Senior Circuit Judge, and MACKENZIE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Joseph Grady Wright, III (WRIGHT & TRAMMEL, on brief); Ansel Darwyn Orander, Jr. (James C. Alexander, COYLE, HUGHES & ALEXANDER, on brief) for Appellants.
Cary Calhoun Doyle, Sr. (DOYLE & O'ROURKE, on brief) for Appellees.

PER CURIAM:

The actions underlying this appeal were brought by the estates of two men, Warren Thomas Sutherland and Donald Joe White, who were killed in a high speed police pursuit. The estates sued the officer who drove the chase car, claiming he used unreasonable deadly force in stopping the decedents' vehicle, and the City of Easley, South Carolina and its police chief, alleging they failed to supervise and train their police officers and to implement appropriate policies concerning high speed chases. The estates appeal the entry of summary judgment for the defendants. We affirm.

I

Early on the morning of September 7, 1985, Sergeant James Terry Moore and Officer Larry Waters of the Easley Police

Department were notified that the Pickens County Sheriff's Department was pursuing a white Maverick toward the city. Moore and his partner spotted a car matching that description and gave chase with full lights and sirens. Moore was at the wheel of the squad car. The Maverick ran a red light and continued at high speed through the streets of Easley. The cars turned onto Robert P. Jeans Road, which Moore later described as "a winding little road" and "rough." At one point, the road dips, curves to the right, and has a bump. The dispatcher warned Moore he would have trouble with the curve, and Moore, who was familiar with the road, put on his brakes. The Maverick did not slow. When it hit the bump, it flew through the air, flipped over, and crashed into a utility pole. The driver of the car, 20-year-old Donald Joe White,

and his passenger, 22-year-old Warren Thomas Sutherland, were killed.

Representatives of the Sutherland and White estates brought actions under 42 U.S.C. §§ 1981, 1983, and 1988, alleging violations of the decedents' fourth, fifth, and fourteenth amendment rights.[1] The complaints named Moore individually and as a police officer, Kenneth Holcombe individually and as Easley police chief, and the City of Easley. The actions were consolidated, and the defendants filed a motion for summary judgment. The plaintiffs filed for judgment on the pleadings and partial summary judgment. After argument on the defendants' motion, a United States magistrate entered summary judgment for the defendants, with prejudice. The administrators of the

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[1]The complaints also raised pendent claims under state wrongful death and survival statutes.

Sutherland and White estates appeal.[2]

II.

In reviewing a decision to grant summary judgment, we apply the same standard as the court below--summary judgment is appropriate only if "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c): see Helm v. Western Maryland Ry. Co., 838 F.2d 729, 734 (4th Cir. 1988). But the party opposing the motion "must do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), because the judge (or here, the magistrate) must

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[2]With the consent of the parties, a magistrate may conduct the proceedings and order entry of judgment in a civil case. 28 U.S.C. § 636(c)(1). Such a judgment may be appealed directly to the appropriate United States Court of Appeals. 28 U.S.C. § 636(c)(3).

"determine whether there is a genuine issue for trial. . . . [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986).

The appellants contend their case should have been allowed to proceed to trial because the record contains ample evidence that (1) the appellants' actions constituted an unreasonable seizure in violation of the fourth amendment, (2) the appellants used excessive force in violation of substantive due process under the fourteenth amendment, and (3) Chief Holcombe and the city failed to supervise and train officers and to develop a policy concerning high speed chases. We address these arguments seri-

atim.[3]

Appellants contend that the crash which killed the decedents constituted an unreasonable seizure. They put forth two theories, the first derived from a recent Supreme Court decision concerning a high speed chase, Brower v. County of Inyo, 489 U.S. ___, 109 S. Ct. 1378 (1989), which held that claims that police caused a driver to crash into a roadblock were sufficient to allege a fourth amendment seizure. The appellants here contend that the accident site on Robert P. Jeans Road was a natural roadblock which police

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[3]Three Supreme Court opinions relevant to this case were handed down after the magistrate entered his order. See Graham v. Connor, 489 U.S. ___, 109 S. Ct. 1865 (1989); Brower v. County of Inyo, 489 U.S. ___, 109 S. Ct. 1378 (1989); City of Canton, Ohio v. Harris, 489 U.S. ___, 109 S. Ct. 1197 (1989). The most recent of these, Graham, was decided after the appellants filed their opening brief; however, it was addressed in their reply brief and in oral argument.

deliberately used to stop the decedents' car. The record, however, reveals that the decedents chose the route and that police merely realized the danger and slowed down. Nothing other than counsels' speculation suggests police deliberately forced the decedents into the curve with the intention of causing them to crash and slowed only after the accident which ultimately killed the decedents was unavoidable. This is not sufficient evidence of a seizure to support a jury verdict favorable to the appellants. Liberty Lobby, 477 U.S. at 249.[4]

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[4]Our conclusion is consistent with dicta in Brower, in which the Court opined that no unconstitutional seizure occurs in "a police chase in which the suspect unexpectedly loses control of his car and crashes." 109 S. Ct. at 1381. The appellants here make much of the word "unexpectedly," suggesting the crash in the present case was not unexpected because police knew the curve was dangerous. We believe their interpretation creates a distinction which the Court did not intend. All high speed pursuits are

Appellants also urge that police seized the car by bumping it off the road. Their primary support for this contention lies in photographs that show what they assert is white paint on the squad's left front bumper. Having examined this evidence in the light most favorable to appellants Sutherland and White, United States v. Diebold, Inc., 369 U.S. 654, 655 (1962), we conclude the record "could not lead a rational trier of fact to find for the nonmoving party." Matsushita, 475 U.S. at 587. We therefore hold the court below did not err in concluding there was no seizure and entering summary judgment for the police on the appellants' fourth amendment

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dangerous. But Galas v. McKee, 801 F.2d 200, 203 (6th Cir. 1986), which the Court cited favorably in Brower, held that "the use of high-speed pursuits by police officers is not an unreasonable method of seizing traffic violators."

claims.

Appellants also raise a fourteenth amendment substantive due process argument. However, the Supreme Court recently foreclosed that theory in cases such as the one at bar:

> [A]ll claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.

Graham v. Connor, 489 U.S. ___, 109 S. Ct. 1865, 1871 (1989). The preceding fourth amendment analysis, therefore, disposes of appellants' substantive due process argument.

Finally, our conclusion that the appellants have failed to maintain their constitutional claims makes it unnecessary to address their contentions con-

cerning the adequacy of supervision and training provided by police chief Holcombe and the City of Easley.[5]

In view of the above, the judgment of the district court is

AFFIRMED.

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[5]The Supreme Court has explained that § 1983 municipal liability may attach only when the failure to train both evidences "deliberate indifference" to the constitutional rights of its inhabitants and causes the injury in question. City of Canton, 109 S. Ct. at 1204-05. The causal factor is missing here.

APPENDIX B

IN THE DISTRICT COURT OF THE

UNITED STATES FOR THE DISTRICT

OF SOUTH CAROLINA

ANDERSON DIVISION

Wanda Ramey Sutherland, Administratrix of the Estate of Warren Thomas Sutherland, deceased,	)	
Plaintiff,	)	
vs.	)	
Kenneth A. Holcombe, individually and as Chief of Police of the Police Department of the City of Easley, South Carolina; James Terry Moore, individually and as a police officer in the Police Department of the City of Easlev, South Carolina; and the City of Easley, South Carolina, a Municipal Corporation,	)	C.A. No. 8:88-1075-3K
Defendants.	)	
		ORDER
Lola M. White, Administratrix of the Estate of Donald Joe White, deceased,	)	
Plaintiff,	)	

vs.)
)
Kenneth A. Holcombe, in-)
dividually and as Chief)
of Police of the Police)
Department of the City of) C.A. No.
Easley, South Carolina;) 8:88-2225-
James Terry Moore, in-) 3K
dividually and as a)
police officer in the)
Police Department of the)
City of Easley, South)
Carolina; and the City of)
Easley, South Carolina,)
a Municipal Corporation,)
)
Defendants.)

FILED:
JANUARY 31, 1989
ANN A. BIRCH, CLERK
UNITED STATES DISTRICT COURT

This matter is before this court pursuant to Title 28, United States Code, Section 636(c), and an order of reference of the Honorable G. Ross Anderson, Jr., United States District Judge, on October 21, 1988.

Both plaintiffs are represented in these actions by Joseph G. Wright, III, A.D. Orander, Jr., and James C. Alex-

ander. Plaintiff Sutherland filed her complaint on April 26, 1988, and plaintiff White filed her complaint on August 30, 1988, alleging violations of the decedents' rights under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Both decedents were killed as a result of injuries they received in an automobile accident on September 7, 1985. The actions were brought pursuant to 42 U.S.C. §§1981, 1983 and 1988, and the Wrongful Death and Survival Statutory Laws of the State of South Carolina.

The defendants, represented by Cary C. Doyle, answered the Sutherland complaint on May 17, 1988, and the White complaint on September 20, 1988, denying the allegations and asserting the defenses of qualified immunity, contributory negligence and assumption of

the risk. The defendants further contend that this is not a proper §1983 action and is more properly brought as a negligence action under the laws of the State of South Carolina. The cases were consolidated by order of this court filed November 3, 1988.

The defendants filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on December 29, 1988. On January 5, 1988, the plaintiffs filed a motion for judgment on the pleadings or partial summary judgment. A hearing was held on January 26, 1989, at which counsel for both parties argued the defendants' motion for summary judgment. This court will address only that motion in this order.

FINDINGS OF FACT

Based upon the pleadings, depositions and other evidence presented, this court makes the following findings of fact:

1. The plaintiffs are the duly-appointed personal representatives of the estates of the decedents, Warren Thomas Sutherland and Donald Joe White. The decedents died as a result of injuries they sustained in a car accident on September 7, 1985. At the time of their deaths, Sutherland and White were 22 and 20 years old, respectively.

2. Defendant Kenneth A. Holcombe is the Chief of Police for the City of Easley Police Department, and defendant James Terry Moore is a sergeant on the police force. Defendant City of Easley is a municipal corporation organized and existing under the laws of the State of

South Carolina.

3. The jurisdiction and venue of this case is properly before this court.

4. On or about September 7, 1985, between 1:45 a.m. and 2:00 a.m., the decedents ran through a road check on Highway 123 South near Easley, South Carolina, in a white Maverick. Pickens County Sheriff's Deputy Scott C. Zerfoss, was forced to jump out of the way to avoid being hit (Zerfoss deposition, pp. 11-14; Lathem deposition, pp. 13-14).

5. The Pickens County patrol cars immediately began chasing the fleeing Maverick in the direction of the City of Easley (Lathem deposition, p. 19). Deputy Zerfoss advised City of Easley police dispatcher Ed Miller that there was a vehicle pursuit in progress and they were headed in the direction of the city (Miller deposition, p. 6; Zerfoss deposi-

tion, pp. 14-15; Lathem deposition, p. 22). He further informed the dispatcher that he had almost been run down at the road check (Zerfoss deposition, p. 17).

6. Dispatcher Miller relayed this information to defendant Moore, who immediately left in his patrol car with off-duty police officer Larry Waters to assist the county officers (Miller deposition, p. 7; Moore deposition, pp. 13-14; Water deposition, p. 17). In the meantime, the Pickens County officers disbanded the chase after losing the vehicle around the Saco Lowell bridge area (Zerfoss deposition, pp. 16-17; Miller deposition, p. 9).

7. Attempting to anticipate where the vehicle may have been headed, defendant Moore drove his patrol car to the Olive Street area of the city of Easley. Shortly, he and Officer Waters spotted

the white Maverick as it was rounding a sharp curve. The car was traveling recklessly at a high rate of speed in the opposite direction. Defendant Moore pulled over to let the car by and turned his patrol car around. He then turned on his emergency flashers, blue light and siren, and pursued the fleeing car (Moore deposition, pp. 16, 18; Waters deposition, pp. 30-31).

8. The Maverick ran through a red light at an intersection, eventually turning onto Robert P. Jeans Road (Waters deposition, p. 34; Moore deposition, p. 17). Defendant Moore pursued the Maverick on the rural two-lane road, reaching speeds of 80 to 85 miles per hour and possibly higher. At no time did the patrol car get closer than two car lengths from the other car. The driver of the Maverick refused to stop and con-

tinued to drive in an erratic, dangerous and reckless manner at a high rate of speed. Moore radioed for more assistance (Moore deposition, pp. 19-21; Waters deposition, pp. 36-37).

9. As soon as defendant Moore turned onto Robert P. Jeans Road, dispatcher Miller, who was familiar with the road, warned Moore that the chase was approaching a dangerous intersection with a curve and a bump in the road. He warned that control of the vehicles could not be maintained at a high rate of speed (Miller deposition, p. 12).

10. Defendant Moore, who was also familiar with Robert P. Jeans Road, immediately elected to slow down the patrol car. The Maverick continued at the same rate of speed, hit the bump, veered off the road, became airborne, rolled and crashed into a utility pole on the side

of the road (Moore deposition, pp. 22-23; Waters deposition, pp. 42-43). Falling power lines hit the patrol car as it skidded to a stop (Moore deposition, p. 22).

11. Both White, the driver, and Sutherland, the passenger, were killed as a result of injuries they sustained in the accident.

12. At the time of the accident, White was driving with a suspended license (Stanton deposition, pp. 14-16 and Exhibit 5). Results of blood alcohol examinations sent to the S.C. State Law Enforcement Division revealed that Sutherland had a blood alcohol level of .196 and White had a blood alcohol level of .170. Beer cans and drug paraphernalia were found in their vehicle. This court presumes that both men were highly intoxicated during the pursuit and at the

time of the accident.

13. There is absolutely no evidence, including what the plaintiffs referred to as a "secret file," that would support a finding that defendant Moore ever attempted to "bump" the other car or to force it off the road (Stanton deposition, p. 19).

14. Although the plaintiffs speculate that a scrape on the police car was evidence that contact had occurred between the police car and the decedents' car, there is no evidence that the scrape was the result of a "bump" on September 7, 1985.

15. Contrary to the plaintiffs' allegations, this court concludes that the decedents were not forced into the "deadman's curve" by the pursuing patrol car because White chose the route and made a deliberate decision to disobey the

law and to not slow down.

16. This court concludes that the high-speed pursuit by defendant Moore was reasonable, supported by government interest, and did not rise to a constitutional deprivation of the decedents' rights.

17. The plaintiffs had no action against defendant Holcombe or the municipality for the alleged failure to adopt specific policies and to supervise and train his officers concerning high-speed pursuits other than an officer's discretion. There is no evidence the training was grossly inadequate or the proximate cause of the accident.

CONCLUSIONS OF LAW

Summary judgment will be granted if the evidence demonstrates that no genuine issue of material fact exists, and that

the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The court must view the evidence in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Recent cases of the Supreme Court have made increasingly clear, however, that factually unsupported claims and defenses should be prevented from proceeding to trial. Anderson, supra; Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986).

Fourth Amendment

The plaintiffs first argue that the continuance of a high-speed pursuit with knowledge of an impending "deadman's curve" was a seizure in violation of the plaintiffs' Fourth Amendment rights. The

threshold question is whether there was a seizure and, assuming there was a seizure, whether it was unreasonable under the circumstances. Tennessee v. Garner, 471 U.S. 1 (1985).

According to Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968), only when an officer, by means of physical force or show of authority, has in some ways restrained the liberty of a citizen can it be concluded that a seizure has occurred. In this case, there is absolutely no evidence that there was any exercise of physical force, and the plaintiffs' allegation that defendant Moore attempted to force the decedents off the road is merely speculation. Thus, the remaining question is whether the defendant officer, by a show of authority, restrained the liberty of the decedents. Clearly, when the driver made a decision

to flee from the officer rather than obey the officer's directive to stop, neither decedent was restrained. In addition, when the pursuit terminated in the fatal crash, they were not restrained by the officer's show of authority. To the contrary, both men, including the passenger, were injured as a proximate result of the driver's actions, particularly his recklessness and intentional disregard for a show of authority.

Moreover, the same conclusion is reached when the second prong of the analysis is applied. The question is whether or not the high-speed pursuit by the police officer was reasonable under the circumstances. Even assuming that Officer Moore did not know the decedents' vehicle had almost run down a police officer, constituting a felony, he clearly observed that the car was being driven in

a dangerous, reckless and erratic manner. In determining the reasonableness and thus the constitutionality of the action, the court must balance the nature and quality of the intrusion on the individuals' Fourth Amendment rights against the importance of the governmental interest. Tennessee v. Garner, supra.

Applying the balancing test to this case, this court concluded that the use of the high-speed pursuit by the police officer was not an unreasonable method of seizing a traffic violator who was driving in an erratic, dangerous and reckless manner, especially one who intentionally disregarded directives to pull over. Galas v. McKee, 801 F.2d 200 (6th Cir. 1986). As a police officer, defendant Moore clearly had a duty to the public to pursue the fleeing car. The accident was

not caused by his actions, nor did any type of seizure take place. Thus, there was no constitutional violation of the decedents' Fourth Amendment rights.

Due Process

The plaintiffs contend that the officer used an excessive amount of force by continuing the high-speed pursuit to force the automobile off the road. In order to consider a Fourteenth Amendment violation, the court must find that the officer's pursuit deprived the decedents of their substantive due process rights or, in other words, their fundamental right to life without due process of law. In reviewing the officer's actions and the City of Easley's policy of permitting high speed chases, the court must use the "shock the conscience" test first enunciated in Rochin v. California, 342 U.S.

165 (1952). The Fifth Amendment, which constrains the federal government, is inapplicable in this matter, because the plaintiffs have failed to allege any federal involvement. Brower v. Inyo County, 817 F.2d 540 (9th Cir. 1987).

Constitutionally excessive force giving rise to a civil rights action is force which is unreasonable under the circumstances. Factors which may be considered are the need for the application of the force, the relationship between the need for the force and the amount of force used, and the extent of the injury inflicted. Justice v. Dennis, 834 F.2d 380 (4th Cir. 1987). Although proof of a violation of procedural due process requires proof of at least grossly negligent conduct, proof of a substantive due process violation requires proof of an even higher degree of culpability involv-

ing malice or wantonness. Justice, at 385 (Phillips, dissenting).

The facts do not under any construction present acts by the defendant officer, intentional or otherwise, which rise to the level of shocking the conscience or of malice or wantonness. Even though the officer had knowledge of the dangerous intersection, he did not choose the route nor did he force the decedents into the curve. Even where there is a foreseeable risk of serious injury resulting from a chase, a police officer will not be held liable because the decedents could have avoided the accident simply by obeying the law and stopping for the blue light and siren. Instead, they appeared to have preferred the risk of injury over the risk of apprehension and suffered the consequences of that choice. Tagstrom v. Pottebaum, 668 F.

Supp. 1269 (N.D. Iowa 1987). In addition, there is absolutely no credible evidence that the officer used deadly force to force the decedents' car off the road. The cases cited by plaintiffs are clearly distinguishable because the police officers employed the use of roadblocks, which are not applicable to this matter.

Now, therefore, for the foregoing reasons,

IT IS ORDERED that the defendants' motion for summary judgment is granted with prejudice.

IT IS SO ORDERED.

/s William M. Catoe, Jr.
UNITED STATES MAGISTRATE

January 31, 1989
Greenville, South Carolina

NOTICE OF RIGHT TO APPEAL

The parties are hereby advised that any appeal from this decision will be taken to the Fourth Circuit Court of Appeals by filing a notice of appeal with the Clerk of the U.S. District Court. Any such notice must be filed with the Clerk of the District Court within thirty (30) days after the date of the order is filed.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

CA-88-1075

No. 89-1708

WANDA RAMEY SUTHERLAND, Administratrix of the estate of Warren Thomas Sutherland, deceased; LOLA M. WHITE, Administratrix of the estate of Donald Joe White, deceased

Plaintiffs - Appellants

v.

KENNETH A. HOLCOMBE, individually and as Chief of Police of the Police Department of the City of Easley, South Carolina; JAMES TERRY MOORE, individually and as a police officer in the Police department of the city of Easley, South Carolina; CITY OF EASLEY, SOUTH CAROLINA, a Municipal Corporation

Defendants - Appellees

UNITED STATES COURT OF APPEALS

FILED:
NOVEMBER 17, 1989
ANN A. BIRCH, CLERK
FOURTH CIRCUIT

APPEAL FROM the United States District Court the District of South Carolina,

THE CAUSE came on to be heard on the record from the United States District Court for the District of South Carolina,

and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, Affirmed.

/s John M. Greacen
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 89-1708

WANDA RAMEY SUTHERLAND, Administratrix of the estate of Warren Thomas Sutherland, deceased; LOLA M. WHITE, Administratrix of the estate of Donald Joe White, deceased

Plaintiffs - Appellants

v.

KENNETH A. HOLCOMBE, individually and as Chief of Police of the Police Department of the City of Easley, South Carolina; JAMES TERRY MOORE, individually and as a police officer in the Police Department of the city of Easley, South Carolina; CITY OF EASLEY, SOUTH CAROLINA, a Municipal Corporation

Defendants - Appellees

UNITED STATES COURT OF APPEALS

FILED:
DECEMBER 11, 1989
JOHN M. GREACEN, CLERK
FOURTH CIRCUIT

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse with the concurrence of Judge Butzner and Judge MacKenzie.

For the Court,

s/ John M. Greacen
Clerk

APPENDIX E

United States District Court

DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

JUDGMENT IN A CIVIL CASE

LOLA M. WHITE, Administratrix of the Estate of DONALD JOE WHITE, deceased

v.

KENNETH A. HOLCOMBE, individually and as Chief of Police of the Police Department of the City of Easley, South Carolina; JAMES TERRY MOORE, individually and as a police officer in the Police Department of the City of Easley, South Carolina; and CITY OF EASLEY, SOUTH CAROLINA, a Municipal Corporation,

CASE NUMBER: C/A #8:88-2225-3

UNITED STATED DISTRICT COURT

FILED:
JANUARY 31, 1989
ANN A. BIRCH, CLERK

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX **Decision by Court.** This action came to hearing before the Court. The issues have been heard and a decision has been

rendered and the defendants' motion for summary judgment have [sic] been granted,

IT IS ORDERED AND ADJUDGED that summary judgment is entered for the defendants Kenneth A. Holcombe, individually and as Chief of Police of the Police Department of the City of Easley, South Carolina, James Terry Moore, individually and as a police officer in the Police Department of the City of Easley, South Carolina, and City of Easley, South Carolina, a Municipal Corporation, with costs of action.

January 31, 1989 /s Ann A. Birch
Date Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ANDERSON DIVISION

Docket No: C/A #8:88-1075-3

WANDA RAMEY SUTHERLAND, Administratrix of the Estate of Warren Thomas Sutherland, Deceased,

Plaintiff,

-vs-

KENNETH A. HOLCOMBE, Etc., Et Al.

Defendant

UNITED STATES DISTRICT COURT

FILED:
OCTOBER 21, 1988
ANN A. BIRCH, CLERK

ORDER OF REFERENCE

In accordance with the provisions of 28 U.S.C., Section 636(c), the parties in the above captioned civil matter having waived their right to proceed before a Judge of the United States District Court

and having consented to have a United States Magistrate conduct any and all further proceedings in the case (including the trial) and order the entry of a final judgment;

IT IS HEREBY ORDERED that the above captioned matter be referred to United States Magistrate WILLIAM M. CATOE, JR. for the conduct of all further proceedings and the entry of judgment.

/s G. Ross Anderson Jr.
UNITED STATES DISTRICT JUDGE

Date:

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

ANDERSON DIVISION

Docket No: C/A #8:88-2225-3

LOLA M. WHITE etc.,

Plaintiff,

-vs-

KENNETH A. HOLCOMBE, Etc., Et Al.

Defendant

UNITED STATES DISTRICT COURT

FILED:
OCTOBER 21, 1988
ANN A. BIRCH, CLERK

ORDER OF REFERENCE

In accordance with the provisions of 28 U.S.C., Section 636(c), the parties in the above captioned civil matter having waived their right to proceed before a Judge of the United States District Court and having consented to have a United

States Magistrate conduct any and all further proceedings in the case (including the trial) and order the entry of a final judgment;

IT IS HEREBY ORDERED that the above captioned matter be referred to United States Magistrate WILLIAM M. CATOE, JR. for the conduct of all further proceedings and the entry of judgment.

s/ G. Ross Anderson Jr.
UNITED STATES DISTRICT JUDGE

Date: Oct. 19, 1988

APPENDIX G

IN THE DISTRICT COURT OF THE

UNITED STATES FOR THE DISTRICT OF

SOUTH CAROLINA

ANDERSON DIVISION

Civil Action No. 8:88-1075-3K

Wanda Ramey Sutherland, Administratrix of the Estate of Warren Thomas Sutherland, deceased,

Plaintiff,

VS.

Kenneth A. Holcombe, et al.,

Defendants.

UNITED STATES DISTRICT COURT

FILED:
NOVEMBER 3, 1988
ANN A. BIRCH, CLERK

ORDER OF CONSOLIDATION

Civil Action No. 8:88-2225-3K

Lola M. White, Administratrix of the Estate of Donald Joe White, deceased,

Plaintiff,

vs.

Kenneth A. Holcombe, et al.,

Defendants.

This matter is before the Court on motion of the defendants to consolidate the above-captioned actions for trial. The motion is based on the grounds that the actions arise out of the same automobile accident, they are against the same defendants, and they involve common questions of law and fact.

The plaintiffs have filed no opposition to the motion.

Now, therefore,

IT IS ORDERED that the above-captioned cases are hereby consolidated for the purpose of trial. The trial shall be set for January 31, 1989.

IT IS SO ORDERED.

s/ WILLIAM M. CATOE, JR.
UNITED STATES MAGISTRATE

November 3, 1988
Greenville, South Carolina

(2)

Supreme Court, U.S.
FILED
APR 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1437

In The

Supreme Court of the United States

October Term, 1989

WANDA RAMEY SUTHERLAND, et. al.,

Petitioners,

v.

KENNETH A. HOLCOMBE, et. al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the decision of the court below that police pursuit of decedents' vehicle into a curve, where the decedents lost control and crashed, did not constitute a "seizure" comport with the applicable decisions of this Court?

2. Does *Graham v. Conner,* 109 S. Ct. 1865 (1989) require that all claims that law enforcement officers have used excessive force in the course of an arrest or other "seizure" be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach?

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STATEMENT OF THE CASE

Petitioners isolate their description of the circumstances giving rise to the high speed chase by police to the fact that pursuit began when decedents' vehicle "crossed the center line of a city street at an estimated speed of 65 mph." (Petition at 7). They omit that decedent driver ran a roadcheck, escalating his speed as he approached the roadcheck, forcing a deputy off the roadway to prevent being hit. (J.A. 130-31).

The deputies manning the roadcheck gave pursuit but lost the suspects. Deputy Zerfoss advised the Easley City Police dispatcher that decedents' car was headed in the direction of Easley (J.A. 132-35).

Petitioners also incorrectly state at page seven of their petition that the Easley policemen Moore and Waters were not told why decedents were being pursued, as both testified that they were told by the dispatcher that the suspect vehicle has almost run over a deputy sheriff at a roadblock. (J.A. 59, 92).

The policemen observed the decedents' car coming around a sharp curve at a high rate of speed on the wrong side of the road. (J.A. 60). The car turned onto North A Street, then onto Alfred Road, and was leaning and spinning. (J.A. 62-63). Decedents then turned again onto Robert P. Jeans Road, (J.A. 64), where they ran off one side of the road and back to the other, driving erratically and at high speeds. (J.A. 66).

While the policemen got as close as two or three car lengths during the chase, that was the closest they came to decedents' car. When the officers were 250 to 300 feet from the curve at the intersection of Rock Road, they started slow-

ing down because they knew the curve could not be negotiated at that speed. (J.A. 66, 69). Thus, when decedents' car left the road, the police were four or five car lengths behind. (J.A. 68). In this connection, Petitioners refer, at pages 7 and 13 of the Petition, to "photographic evidence that the patrol car actually bumped the decendents' car from the road," but at pages 6 and 13, they acknowledge that the police were two or three car lengths, or at very close range, until they slowed down just before reaching the curve in which decedents lost control. Accordingly, the references to "bumping" were characterized by the court of appeals as mere speculation by counsel.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners cite no decision of a United States court of appeals that even appears to conflict with the Fourth Circuit's ruling; and the Fourth Circuit followed to the letter the precedents of this Court, including *Graham v. Connor,* 109 S.Ct. 1865 (1989), and *Brower v. County of Inyo,* 109 S.Ct. 1375 (1989).

I. THE FOURTH CIRCUIT'S FINDING THAT THERE WAS NO SEIZURE COMPORTS WITH THE APPLICABLE DECISIONS OF THIS COURT

Petitioners in their Question I attempt to equate a dangerous curve with a police roadblock, then argue that this case should be likened to *Brower v. County of Inyo,* 109 S.Ct. 1375 (1989), in which this Court held that the utilization of a

police roadblock to stop a fleeing car thief constituted a seizure. The argument is superficial. Petitioners ignore that the means, roadblock or otherwise, by which a desired termination of freedom is effected must be intentionally applied in order that there be a seizure. In other words, the mere fact that a dangerous curve might produce the same result as did the police-erected roadblock in *Brower,* coupled with the fact that decedents were being pursued when they crashed, does not lead to the conclusion that there was a seizure.

Like the hypothetical situation in *Brower,* the police intentionally pursued decedents and "sought to stop [them] by the show of authority represented by flashing lights and continuing pursuit; and though he was in fact stopped, he was stopped by a different means - his loss of control of his vehicle and the subsequent crash," *Id.,* at 1381. Decedents, and they alone, chose the circuitous route by which they reached the dangerous curve, or natural roadblock. There is no reason to believe that had they chosen some other route they would have suffered a different fate, for, as the Fourth Circuit observed, "All high speed pursuits are dangerous." *Sutherland, et. al. v. Holcombe, et. al.,* No. 89-1708, slip op. at 5 n. 4 (4th Cir. Nov. 17, 1989).

In summary, decedents' freedom of movement was terminated when they crashed into a "roadblock" while fleeing the police, just as in *Brower.* Unlike *Brower,* however, the roadblock into which they crashed was not a "police roadblock;" instead, it was a natural roadblock. It was not erected by police, nor were decedents propelled into it by police. Decedents did not lose their freedom of movement "through means intentionally applied."

II. THE FOURTH CIRCUIT'S INTERPRETATION OF *GRAHAM V. CONNOR,* 109 S. Ct. 1865 (1989), TO FORECLOSE PETITIONERS' FOURTEENTH AMENDMENT SUBSTANTIVE DUE PROCESS CLAIM IS CORRECT.

Petitioners argue that nothing in *Graham v. Connor, Id.,* forecloses a Fourteenth Amendment due process analysis because *Graham* applies only to claims involving seizure, and that since the court has held there was no seizure here, the substantive due process approach should be applied.*

Petitioners' complaints (J.A. 8-17, 26-36) base jurisdiction upon both the Fourth and Fourteenth Amendments, as well as 42 U.S.C. 1983, but the complaints state only a single claim against each defendant, based upon a single set of facts, i.e., a police pursuit culminating in an automobile accident in which decedents lost their lives. Petitioners allege gross negligence and recklessness in various particulars (none of which could have any causal connection with the accident), but all are in the context of the police pursuit which was found not to have constituted a seizure under the Fourth Amendment "reasonableness" standard, far less stringent than the requirements of the Fourteenth Amendment substantive due process standard.

Although the factual situation differed, similar claims were made under both the Fourth and Fourteenth Amend-

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* In Roach v. City of Fredricktown, 882 F2d 294 (8th Cir. 1989), the only pertinent circuit court decision since Graham, the court, after affirming dismissal of the Fourth Amendment claim, did employ a §1983 analysis on a negligence standard - perhaps on an "even if" basis.

ments in *Tennessee v. Garner,* 470 U.S. 901 (1985), but this Court analyzed the claims solely by reference to the Fourth Amendment. Then, when the Fourth and Fourteenth Amendment claims were again raised in *Graham,* this Court said:

> Today, we make explicit what was implicit in *Garner's* analysis, and hold that all claims that law enforcement officers have used excessive force in the course of an arrest...or "other seizure" ... should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach.

Graham v. Connor, 109 S.Ct. at 1871. It follows that *Graham v. Conner* foreclosed petitioners' Fourteenth Amendment substantive due process claim.

CONCLUSION

There is no United States court of appeals decision in conflict with the ruling of the Fourth Circuit, and the Fourth Circuit's decision is in accord with this Court's applicable decisions. Petitioners simply disagree with the Fourth Circuit's finding that the evidence could not sustain a finding of a seizure by police. The Petition for a Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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